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ABSTRACT

Personnel decisionmaking at colleges and universities is discussed, with consideration of ways to avoid legal problems. Two approaches are recommended for universities: develop procedures to minimize the risk of law suits by faculty members and school staff, and provide protection from lawsuits for faculty and staff. Institutional procedures that can control risk are identified: expectations for faculty members should be stated clearly, especially in the letter of offer; departmental colleagues and heads should monitor performance, point out shortcomings, and note areas in which improvement is required. If there is to be a later decision not to give tenure or not to promote, a background of performance evaluation that will substantiate that judgment is very important. To minimize risk, the decisionmaking process regarding promotion, tenure, and other personnel concerns should meet several "fairness" tests: ample opportunity should be provided for contribution of relevant materials by the person being evaluated; different evaluation methods and viewpoints should be allowed; confidentiality should be respected; and opportunity for appeal should be adequate. The university must assume risk when a faculty member acts in good faith to participate in the evaluation of a faculty colleague. University of Missouri rules and regulations for the defense and protection of employees are appended. (SW)

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THE DECISION-MAKER PERSPECTIVE: PROCEDURES WHICH AVOID LEGAL HASSLES

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George Stevens, in a paper in The Journal of College and University Law, 1977, begins his discussion this way: "An uninhibited evaluation of a colleague's professional competence became increasingly hazardous within colleges and universities during the 1970s. For several reasons, a decision to deny the educator promotion and tenure or to terminate his or her employment is more likely to result in legal action than in previous years."[1] While we all may regret and resent this increased hazard, we must also remember that it results in part from past misuse of evaluation systems, from occasional discriminatory use of dual standards, and from sometimes too casual regard for individual rights.

Despite the sometimes legitimate reasons for increased litigation, this change in tradition has nonetheless intimidated many faculty. I see thoughtful faculty members within the University of Missouri refusing to serve on promotion and tenure committees and refusing to participate with candor in evaluations of their peers. I regard that as a great misfortune, because it will inevitably mean that more personnel decisions in the faculty arena are made by administrators and boards, if not by courts. Even worse, I see a tendency to lower standards and avoid hard academic decisions, simply because of fear of being sued. Faculty members are making blander statements in discussing their colleagues and are showing a greater willingness to recommend tenure while denying privately that they meant it, out of simple fear of legal harrassment. Such an erosion of responsible judgments will have disastrous consequences for the quality of higher education.

It seems important, therefore, for universities to do two things. First, they must do everything they can to develop procedures that can minimize the risk. Secondly, they must provide solid protection, for

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faculty and staff, so that concerns about legal defense and potential liability are erased.

The best way to prevent many problems is to hire very well, so that only superbly qualified people are considered for promotion and tenure. And while you may think I'm kidding, this is a serious suggestion. A sure way to run into problems is to hire a marginally qualified person and keep him or her on until the last possible moment for a tenure decision, in hopes that the performance will ultimately be high enough to merit a positive decision. In many cases, institutions have policies which inadvertently work against the hiring of the very best people. In times of fiscal stringency, a department is likely to fear that if it does not fill a position quickly, the position may be lost to it through reallocation. I have heard deans and department heads speculate that if they continue the search when they're not fully satisfied with the candidates to date, the position may not be available the next year, and hence a less-than-desired hiring decision is made. To hire only the best, based on full investigation and substantiation of credentials and experience, is certainly the easiest and cheapest way to avoid much of the risk of legal hassles in faculty evaluation.

Another way of avoiding risk is to counsel out of the department at an early stage those who seem unlikely to survive a tenure evaluation. To do this successfully requires a determined, strong, and yet sensitive chairman. It is sometimes the case that a person who gets off to a disappointing start will be a late bloomer, but my experience demonstrates that that's the exception rather than the rule. Generally, one can tell at a fairly early stage in a person's career whether or not the person is going to make it. For those who appear doubtful, a good adminstrator who works at it can either help the person improve to an above-adequate level or can help the person see that he or she has no future in the department and actively and yet gently help that person find another job. I have a good friend who as a department chairman has done that successfully in three cases in the last five years, thus avoiding a great deal of hassle.

But what if risk avoidance fails, as it sometimes will, and we are in a position where we must anticipate a difficult evaluation with the possibility of controversy or litigation. In his useful book, The Law of Higher Education, William Kaplin speaks of risk control--if we can't avoid risk, then we must put effort into reducing the frequency or severity of potential exposure to liability.[2] It is that kind of risk control that I think we must institute so that our best faculty members will feel comfortable in making the tough-minded decisions which are essential if we are to improve the quality of our institutions. I'd like to describe three elements of institutional procedures which I believe can control risk.

First, it is essential that we state clearly the expectations which apply to faculty members. It may seem obvious to some of us that a faculty member in a research institution is expected to do research, for example, but it had better be stated explicitly in advance. Unwritten expectations deriving from some presumed traditonal culture of higher education will not generally be enough in a court of law to substantiate the failure of the individual to comply with the terms and conditions of employment. A key factor in this area is the letter of offer, and I urge all administrators to control very carefully what is said, both orally and in writing, at the time a person is hired. I have read a lot of letters of offer which state no expectations or conditions and which then set the stage for legal disagreements about whether or not later evaluation was fair.

Second, it is essential that departmental colleagues and heads monitor performance, point out shortcomings, and note areas in which improvement is required. The first reason for such performance monitoring is, of course, to help the person improve. But if there is to be a later decision not to give tenure or not to promote, a background of performance evaluation which will substantiate that judgment is very important. In too many of our departments, we find little discussion of performance, almost across the board raises which make no distinctions among people, and no record in the files of any problems which need to be corrected. I have had deans come to me to ask about filing charges to dismiss a tenured faculty member. My first question is

always about the raises given to that person over the last five years, and I'm appalled at how often they are at or above the average raise given in the University. Quite often administrators profess not to see any connection between annual salary increases and whether or not the person merits retention on the faculty. But I can tell you it's very hard to argue in any quasi-legal proceeding that someone ought to be fired if that person has been given above average salary increases over an extended period. As Barbara Lee puts it in her very helpful paper "Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation" in The Journal of College and University Law, "Courts have also noted with approval instances where plaintiffs have been warned about their inadequate performance, stating that such warnings acted as notice to plaintiffs of their failure to meet the criteria for advancement."[3] In addition, of course, such monitoring of performance seems only fair to the individual involved.

Finally, there is the decision-making process itself, whether for reappointment, promotion, tenure or salary increases. That process, if risk is to be minimized, is well described by Thomas Flygare in a paper about the Keene State College v. Sweeney case. He says: "What is both needed and possible . . . is a process which brings all available evidence to bear on the decision; a process which measures in a meaningful way a faculty member's progress in meeting defined standards; a process which documents the basis for decisions; and a process which can be neutrally explained to a person not necessarily well-versed in scholarly endeavors."[4]

From the perspective of a decision-maker wishing to minimize risk, the process should meet several "fairness" tests. Among them are these:

--the process should provide ample opportunity for contribution of relevant materials by the person being evaluated;

--the process should involve many different evaluation methods and viewpoints, to avoid over-reliance on one instrument or personality;

--the process should respect confidentiality to the greatest extent possible, but participants must be prepared to state appropriate reasons for their decisions;

--there should be adequate opportunity for appeal by the individual, but a final decision should be rendered reasonably promptly;

One "output" test of fairness is the consistency of results of the process over a long period of time.

In my opinion, an institution will be well advised to spend some time stating expectations clearly and carefully in advance, ensuring the monitoring of performance, and devising adequate procedures. If it can do this, then it can offer to its faculty members not only fair evaluation of themselves, but once they have established themselves in the institution, a reasonably protected opportunity to participate fully in the evaluation of their peers with candor and confidence.

Let me turn, then to the second essential element of a University's practices if sound academic decisions are to be made. That element is a policy on defense and protection of faculty that offers them iron-clad guarantees that adequate legal defense will be offered and financial protection, as unlimited as possible, will be available in case of a negative judgment in a court case. Now my lawyer friends will be quick to point out that there must be some conditions in any such policy; for example, the University probably cannot be liable if the faculty member acts deliberately and willfully to discriminate unlawfully. But the University must assume virtually all of the risk in any case in which a faculty member acts in good faith to participate in the evaluation of a faculty colleague. Anything less than that will leave the faculty uneasy about participating or unwilling to use appropriately high standards of judgment. The University of Missouri has such a policy, and a copy of it is appended.

While faculty would still prefer a world in which they could be guaranteed that they ould never be sued, they are beginning to realize that that world, if it ever existed, is gone forever and that

they will have to accept something less. But the institution does owe them its full support if thoughtful and strong faculty members are to put themselves in jeopardy by being part of faculty personnel decision-making, whether the question be reappointment, tenure, or promotion. In order to ensure that involvement with candor and tough-mindedness, it is essential to reduce to as low a level as possible the risk of those who participate in good faith. I've suggested two broad ways in which that can be done--the first being to avoid much of the risk by hiring only superb people and then counseling out of the program at an early stage those who fail to live up to that early expectation. The second broad way to reduce risk is to have in place certain institutional policies and procedures that are fair both to the institution and to the person being evaluated. The critical elements of these, it seems to me, include a clear statement of expected levels of performance; careful monitoring of performance and documentation of weaknesses, and then personnel decision procedures that incorporate certain basic elements of fairness. Surrounding both of these approaches to risk reduction should be a policy for defense and indemnification of faculty that offers them almost iron-clad protection against any remaining jeopardy.

In such a setting, I believe institutions can expect and will receive useful faculty participation in peer judgments. More important, such institutions will make sound personnel decisions which will improve the quality of teaching and research over a long period of time. And that presumably is the ultimate purpose of any personnel decision-making procedure.

NOTES

1. Stevens, George E. "Evaluation of Faculty Competence as a 'Privileged Occasion,'" The Journal of College and University Law, 4 (Summer 1977), 281.

2. Kaplin, William A. The Law of Higher Education. San Francisco: Jossey-Bass, Inc., 1978.

3. Lee, Barbara A. "Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation," The Journal of College and University Law, 9 (1982-83), 299.

4. Flygare, Thomas J. "Board of Trustees of Keene State College v. Sweeney," The Journal of College and University Law, 7 (1980-81), 110.

5.0019 Policy on Defense and Protection of University Employees in the University of Missouri Rules and Regulations (Bd. Min. 5-6-83)

An officer, faculty member, or other employee of the University of Missouri will be provided defense and protection against loss, damage, or expense in connection with any claim or suit allegedly related to or arising out of the performance of duties for or employment with or by the Curators of the University of Missouri, subject to the following conditions:

.01 Such an officer, faculty member, or other employee who, individually or with others, is named as a defendant in legal actions or proceedings submits a request for such defense and protection to the President.

Such a request shall include:

a. A brief description of the circumstances surrounding the incident giving rise to the legal action;

b. Documentation to verify that the named individual was acting within the scope of his or her official duties at the time of the incident; and

c. A copy of the summons or petition served on the named individual.

.02 The President determines that the named individual was acting in good faith and within the scope of his/her employment or authority.

.03 Such defense or protection is legally permissible.

.04 No protection will be provided if a court determines that the action arose out of malfeasance in office or willful or wanton action or neglect of duty.

While such defense and protection normally will be provided by insurance maintained by the University, this policy applies without regard to the availability of insurance coverage. If the initial determination is made by the President that the named individual is entitled to defense, it shall be provided either by insurance or by the General Counsel or by an outside counsel appointed by the General Counsel on behalf of the individual.